

### § 701.13

agreements between the Office and another agency to eliminate the need for consultations or referrals of requests or classes of requests.

(g) *Separate referrals of portions of a request.* Portions of a request may be referred separately to one or more other agencies whenever necessary to process the request in accordance with the provisions of this section.

(h) *Date for determining responsive records.* In determining records responsive to a request, the Office ordinarily will include only those records within the Office's possession and control as of the date of its receipt of the request.

### § 701.13 Form and content of Office responses.

(a) *Form of notice granting a request.* After the Office has made a determination to grant a request in whole or in part, the Office shall so notify the requester in writing. The notice shall describe the manner in which the record will be disclosed, whether by providing a copy of the record to the requester or by making a copy of the record available to the requester for inspection at a reasonable time and place. The procedure for such an inspection shall not unreasonably disrupt the operations of the Office. The Office shall inform the requester in the notice of any fees to be charged in accordance with the provisions of § 701.18 of this part.

(b) *Form of notice denying a request.* The Office, when denying a request in whole or in part, shall so notify the requester in writing. The notice must be signed by the FOIA/PA Officer, or her designee, and shall include:

(1) The name and title or position of the person responsible for the denial;

(2) A brief statement of the reason or reasons for the denial, including the FOIA exemption or exemptions that the Office has relied upon in denying the request and a brief explanation of the manner in which the exemption or exemptions apply to each record withheld; and

(3) A statement that the denial may be appealed under § 701.16(a) and a description of the requirements of that subsection.

(c) *Record cannot be located or has been destroyed.* If a requested record cannot be located from the information

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supplied, or is known or believed to have been destroyed or otherwise disposed of, the Office shall so notify the requester in writing.

### § 701.14 Classified information.

In processing a request for information that is classified or classifiable under Executive Order 12356 or any other Executive Order concerning the classification of records, the Office shall review the information to determine whether it warrants classification. Information that does not warrant classification shall not be withheld from a requester on the basis of 5 U.S.C. 552(b)(1). The Office shall, upon receipt of any appeal involving classified or classifiable information, take appropriate action to ensure compliance with Executive Order 12356 or any other Executive Order concerning the classification of records.

### § 701.15 Business information.

(a) *In general.* Business information provided to the Office by a business submitter shall not be disclosed pursuant to a FOIA request except in accordance with this section.

(b) *Notice to business submitters.* The Office shall provide a business submitter with prompt written notice of a request encompassing its business information whenever required under paragraph (c) of this section, except as is provided in paragraph (g) of this section, and only to the extent permitted by law. Such written notice shall either describe the exact nature of the business information requested or provide copies of the records or portions thereof containing the business information.

(c) *When notice is required.* For business information submitted to the Office it shall provide a business submitter with notice of a request whenever the business submitter has in good faith designated the information as commercially or financially sensitive, or the Office has reason to believe that disclosure of the information may result in commercial or financial injury to the business submitter. Notice of a request for business information falling within the former category shall be required for a period of not more than ten years after the date of submission

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unless the business submitter requests, and provides acceptable justification for, a specific notice period of greater duration. Whenever possible, the submitter's claim of confidentiality should be supported by a statement or certification by an officer or authorized representative of the company that the information in question is in fact confidential commercial or financial information and has not been disclosed to the public.

(d) *Opportunity to object to disclosure.* Through the notice described in paragraph (b) of this section, the Office shall afford a business submitter a reasonable period within which to provide the Office with a detailed statement of any objection to disclosure. Such statement shall specify all grounds for withholding any of the information under any exemption of the FOIA and, in the case of Exemption 4, shall demonstrate why the information is contended to be a trade secret or commercial or financial information that is privileged or confidential. Information provided by a business submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA.

(e) *Notice of intent to disclose.* (1) The Office shall consider carefully a business submitter's objections and specific grounds for nondisclosure prior to determining whether to disclose business information. Whenever the Office decides to disclose business information over the objection of a business submitter, the Office shall forward to the business submitter a written notice which shall include:

- (i) A statement of the reasons for which the business submitter's disclosure objections were not sustained;
- (ii) A description of the business information to be disclosed; and
- (iii) A specified disclosure date.

(2) Such notice of intent to disclose shall be forwarded a reasonable number of days, as circumstances permit, prior to the specified date upon which disclosure is intended. A copy of such disclosure notice shall be forwarded to the requester at the same time.

(f) *Notice of FOIA lawsuit.* Whenever a requester brings suit seeking to compel disclosure of business information covered by paragraph (c) of this section,

the Office shall promptly notify the business submitter.

(g) *Exceptions to notice requirements.* The notice requirements of this section shall not apply if:

- (1) The Office determines that the information should not be disclosed;
- (2) The information lawfully has been published or otherwise made available to the public;
- (3) Disclosure of the information is required by law (other than 5 U.S.C. 552); or
- (4) The Office is a criminal law-enforcement agency that acquired information in the course of a lawful investigation of a possible violation of criminal law.

### § 701.16 Appeals.

(a) *Appeals to Independent Counsel.* When a request for access to records or for a waiver of fees has been denied in whole or in part, or when the Office fails to respond to a request within the time limits set forth in the FOIA, the requester may appeal the denial of the request to Independent Counsel within 30 days of his receipt of a notice denying his request. An appeal to Independent Counsel shall be made in writing and addressed to the Office of Independent Counsel, Suite 701 West, 555 Thirteenth Street NW., Washington, DC 20004. Both the envelope and the letter of appeal itself must be clearly marked: "Freedom of Information Act Appeal."

(b) *Action on appeals by the Office of Independent Counsel.* Unless Independent Counsel otherwise directs, his designee shall act on behalf of the Independent Counsel on all appeals under this section, except that a denial of a request by Independent Counsel shall constitute the final action of the Office on that request.

(c) *Form of action on appeal.* The disposition of an appeal shall be in writing. A decision affirming in whole or in part the denial of a request shall include a brief statement of the reason or reasons for the affirmance, including each FOIA exemption relied upon and its relation to each record withheld, and a statement that judicial review of the denial is available in the United States District Court for the judicial district in which the requester resides